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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

AZTEC ENGINEERING CALIFORNIA, INC., Plaintiff and Appellant, v. CITY OF SOUTH PASADENA, Defendant and Respondent.	B220134 (Los Angeles County Super. Ct. No. GC041442)

APPEAL from a judgment of the Superior Court of Los Angeles County. C. Edward Simpson, Judge. Affirmed.

Snipper, Wainer & Markoff and Maurice Wainer for Plaintiff and Appellant.

Jones & Mayer, Kimberly Hall Barlow and Krista MacNevin Jee for Defendant and Respondent.

Aztec Engineering California, Inc. appeals from a judgment dismissing its second amended complaint against the City of South Pasadena (City) for failure to pay for additional work it performed outside of the scope of the parties' contract. Because it is barred from asserting a breach of contract claim by the express terms of the contract, it seeks to allege various tort and quasi-contract claims against the City. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In 2000, Aztec entered into a contract with the City to provide design and engineering services for improvements at Fair Oaks Avenue and the 110 freeway. The contract was amended by written agreement on March 21, 2001 and May 1, 2002 to expand the scope of the services provided.[1] Aztec brought suit against the City on September 9, 2008, for intentional misrepresentation, promise made without an intention to perform, breach of third party beneficiary contract and breach of implied covenant of good faith and fair dealing. The City's demurrers were twice sustained with leave to amend by the trial court.

On April 22, 2009, Aztec filed a second amended complaint that alleged as follows:

In or after April 2004, the City asked Aztec to perform additional work outside the scope of the services specified in the Agreement. Aztec completed the additional work without receiving a signed amendment to the Agreement.

By letter dated January 20, 2005, Aztec provided the City with a summary of the tasks performed to date and advised the City that it included "$244,578 in subconsultant out of scope items" which were "unanticipated" and "per the direction of either the [Design Advisory Group], City Council, a Caltrans need, or due to a change in project scope." The City's Public Works Director, William Galvez and other City representatives, including Albert Carbon, Edward Hitti and Karen Heit, all assured Aztec that it would be paid for the extra work through a reallocation of funding from the

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[1] We will refer to the contract between Aztec and the City along with the amendments as the "Agreement."

construction portion of the project to the design portion. However, Galvez failed to tell Aztec that Cal Trans needed to approve the transfer of funds. On April 17, 2006, Galvez requested the $250,000 reallocation of funds from Cal Trans. The request was denied "[a]fter numerous weeks of discussions with Cal Trans and the City's representatives[.]" An invoice from Aztec dated July 17, 2006, showed a charge for "Out of Scope Work" from June 1, 2005 to July 1, 2006, that totaled $124,958.55.

On August 8, 2006, Galvez induced Aztec to enter into an agreement with Parsons Transportation Group Inc. as a subconsultant providing design and engineering services ("Parsons subcontract"). The City had contracted with Parsons to perform construction on the project. Aztec understood this subconsultant agreement to be an end run around Cal Trans' refusal to reallocate funds. Galvez told Aztec that the construction phase of the project had been approved and funded and that construction would begin without delay. The Parsons subcontract was signed in January 2007. When Aztec demanded payment from Parsons in the amount of $324,293 by letter dated January 30, 2008, Parsons stated that its contract with the City had not yet been authorized, "which does not allow [Parsons] to authorize any work or release any payments to any of our vendors/subconsultants." Parsons advised Aztec that "this is an issue you need to pursue with the City." The Parsons subcontract was later cancelled due to unspecified problems with the start of construction and Aztec was never paid for the extra work it did. Aztec continued to negotiate with the City with no success through January 2008, regarding the money it was owed as a result of the extra work it did.

In addition to the facts alleged above, Aztec attached copies of the Agreement to the second amended complaint. Of particular relevance to this matter is paragraph 18 of the Agreement which provides: "This Agreement may not be modified, nor may any of the terms, provisions or conditions be modified or waived or otherwise affected, except by a written amendment signed by all parties hereto." This provision was repeated in the amendments. The Agreement also provided for a maximum contract amount, which was increased with each amendment, and stated that "Contractor shall not be obligated to perform any services which would result in compensation over that maximum amount."

Aztec's second amended complaint included claims for intentional misrepresentation, promise made without an intention to perform, breach of third party beneficiary contract, breach of implied covenant of good faith and fair dealing and breach of warranty.

The City again demurred on the grounds of municipal immunity, that any oral agreement for extra work performed by Aztec was invalid and not properly approved by the City and was barred by Aztec's failure to comply with the Government Tort Claims Act. (Gov. Code, § 900, et seq.) Oral arguments were heard on July 14, 2009, and the trial court issued a ruling on July 16, 2009, "demurrer is sustained without leave to amend for the reasons identified in the moving papers. Plaintiff has not articulated facts that further amendment would overcome the deficiencies in its third party beneficiary [cause of action]. See *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916." Judgment was entered August 11, 2009, with notice provided on September 15, 2009. Aztec appealed on October 23, 2009.

DISCUSSION

I. Standard of Review

Because this appeal is from a judgment of dismissal entered after the trial court sustained defendant's demurrer, we assume the truth of all properly pleaded material allegations of the complaint. (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 702.) Where a general demurrer to a complaint is sustained without leave to amend, "the issues presented are whether the complaint states a cause of action, and if not, whether there is a reasonable possibility that it could be amended to do so." (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 542.) With these guidelines in mind, we turn to each of the four causes of action to determine whether Aztec stated a valid claim against the City.

II. First and Second Causes of Action: Intentional Misrepresentation and False Promise

A. Aztec Failed to State a Claim

Aztec's first and second causes of action are based in tort—fraudulent concealment and promise made without an intention to perform. In its briefing, Aztec cites to various enumerated paragraphs which it argues "clearly" allege "Respondent's false promises and assurances that . . . [Aztec] would be paid for the extra work it performed and that the work had been approved and funded." In particular, paragraph six of the second amended complaint alleged, "After executing the contracts (Exhibits 'A,' 'B,' and 'C'), Defendant asked Plaintiff to perform additional work pursuant to the contracts but beyond the scope of the services set out in Exhibits 'A,' 'B,' and 'C' which Defendant had originally contracted with Plaintiff to perform . . . Defendant City through its Public Works Director Galvez told Plaintiff that Plaintiff would be paid for the extra work out of funds allocated for utility relocation and construction at the Project as confirmed on Exhibit 'D' hereto . . . The City and the City's representatives . . . each had assured Plaintiff that Plaintiff would get paid for performing the additional services required to obtain project approval through a reallocation of funds. The letter from the City to Cal Trans requesting additional design funds through the de-obligation/obligation process confirms the foregoing (Exhibit 'D')." Exhibit D is a letter dated April 17, 2006, requesting the transfer of funds from Cal Trans.

The remainder of the paragraphs on which Aztec relies alleges that the City's Public Works Director Galvez, in 2006, misled Aztec into believing that it would be paid for the additional work by reallocating its invoice to the construction phase of the project. To that end, the City induced Aztec to execute the Parsons subcontract "based on representations by Galvez that construction would soon begin and that funds had been reallocated." In fact, the construction phase of the project had not been funded and construction was not about to begin. "The promises made by [the City] that Plaintiff could be paid out of the construction part of the DAG Project were made with the intent to induce Plaintiff to defer payment."

On its face, there are any number of problems with Aztec's allegations, not the least of which is that Galvez's alleged misrepresentations were made in 2006, long after the additional work was completed in 2004. In any event, the allegations showed that Galvez promised Aztec in 2006 that he would transfer funds from one part of the project to another to pay Aztec and then *he did what he promised to do*—he tried to transfer the funds. It is settled law that "[a] promise of future conduct is actionable as fraud only if made without a present intent to perform. . . .' [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' [Citation.]" (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481.) While Galvez may have been overly optimistic in believing that Cal Trans would agree to the transfer of funds, the allegations do not state a claim for intentional misrepresentation or false promise.

Aztec's attempt to save its complaint by selectively quoting parts of sentences stating that the City told Aztec it "would be paid" or "would get paid" does not avoid the glaring deficiency. It is unclear from the allegations whether these statements were made in 2006 or prior to Aztec's performance of additional work. It is Aztec's burden to allege facts sufficient to state a claim, particularly in a fraud cause of action where every element must be alleged factually and specifically. (*Lesperance v. North American Aviation, Inc.* (1963) 217 Cal.App.2d 336, 344.)[2] To the extent that Aztec claims it was damaged by other misrepresentations, those are not contained in the second amended complaint and are not considered.[3]

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[2] Aztec seeks another opportunity to amend its complaint because the City did not base its demurrers below on Aztec's failure to allege detrimental reliance. Because we find Aztec's claims fail for other reasons, discussed below, any further amendment would be futile.

[3] In its initial complaint, Aztec alleged it submitted a modification to the Agreement when the City asked it to perform additional work. Aztec also alleged Karen Heit, a City employee, approved the modification verbally and in an email sent on or about August 30, 2005. This allegation was excluded from the second amended complaint. Even if it

B. The Tort Claims Act Immunizes the City from Liability

In any event, misrepresentation or fraudulent concealment claims against public agencies are typically barred under the Tort Claims Act, which provides that "[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional." (Gov. Code, § 818.8.) The Tort Claims Act, however, expressly excludes liability based on contract. (Gov. Code, § 814.) Interpreting these provisions, courts have rejected a claim of governmental immunity in cases where the plaintiff's claim is based in contract rather than tort. Whether an action is based on contract or tort to invoke sovereign immunity depends upon the nature of the right sued upon, not the form of pleading or relief demanded; if the claim is based on breach of a promise, it is contractual, if based on breach of noncontractual duty, it is tortuous, and if unclear, it will be considered based on contract rather than tort. (*Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322.)

In *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, a subcontractor sued the Department of Water and Power (DWP), among others, alleging it was owed more than $1 million for services rendered on a construction project. The DWP served as the project manager and failed to retain sufficient amounts from its payment to the general contractor to pay the subcontractor's claim. The DWP also allegedly knew there existed defects to the project which caused the subcontractor to incur delays and additional work. (*Id.* at pp. 823-824.) The subcontractor filed suit, alleging causes of action for breach of contract, fraudulent intentional interference with economic advantage, conspiracy to induce breach of contract and commit fraud, and money had and received. (*Id.* at p. 826.) As to the tort claims, the subcontractor alleged that the DWP asked plaintiff to perform extra work knowing it had no intention to pay for it as well as making performance by the

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had been included, however, there is no indication what terms were contained in the modification.

subcontractor more difficult. (*Id.* at p. 831.) The DWP's demurrer was sustained without leave to amend. On appeal, the court affirmed, reasoning that, "to the extent the tort causes of action are simply restatements of the contract claims, they are similarly barred by the statute of limitations. We conclude further that to the extent the tort causes of action are based on misrepresentations, DWP is entitled to governmental immunity." (*Id.* at p. 832.)

Similarly here, liability does not attach in a tort claim (which would be barred under the Tort Claims Act) or a contract claim (which would be barred by the express terms of the contract requiring an amendment in writing). As a result, Aztec attempts to walk a fine line between asserting a strict tort claim and a strict breach of contract claim. Instead, it argues its tort claims are based in contract, under a hybrid claim, alleging "Respondent's false promise to execute the [Parsons subcontract] and false promise to pay Appellant for the services it rendered . . . The second basis for imposing tort liability in this case based on a contract arises from the pleadings alleged in the third cause of action for breach of third party beneficiary contract (citation to record) and the fifth cause of action for breach of warranty."

While Aztec may yet avoid the Tort Claims Act under its claim for breach of third party beneficiary contract, (*Walton v. Eu* (1983) 143 Cal.App.3d 403), we agree with the reasoning in *Lundeen Coatings Corp.* To the extent the tort causes of action are based on misrepresentations, the City is entitled to governmental immunity. To the extent its causes of action are based on contract, they are barred under the terms of the Agreement.[4]

III. Third Cause of Action: Third Party Beneficiary Claim

Aztec's third cause of action is for the breach of a third party beneficiary contract. Civil Code section 1559 provides: " 'A contract, made expressly for the benefit of a third

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[4] Aztec does not contend that the trial court's order sustaining the City's demurrer to its fifth cause of action for breach of warranty was in error. Therefore, we need not consider whether a breach of warranty was properly pled or served as a proper basis to avoid the Tort Claims Act under *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285.

person, may be enforced by him at any time before the parties thereto rescind it.' " (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 400.) Aztec alleged that the City's contract with Parsons was made, in part, for its benefit. The City "breached the contract [it had with Parsons] by not going forward with the [Parsons' subcontract] thereby denying Plaintiff the benefit of the bargain causing damage to Plaintiff in a sum according to proof." The Parsons' subcontract was cancelled before Aztec received any payment for its out of scope services.

By asserting a third party beneficiary claim, Aztec again sought to circumvent the express language of its own contract with the City, which required that all work performed outside the scope of the contract be in writing. In *COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, which Aztec argues is "on point," a general contractor entered into a contract to construct a water treatment plant for the Coastside County Water District. The water district agreed to prepare an environmental impact report and hired an engineering firm to do so. The general contractor alleged a third party beneficiary claim against the engineering firm when the engineering firm prepared a defective environmental impact report that caused a delay in construction. (*Id.* at pp. 918-919.) The appellate court held that the water district was subject to an implied covenant to provide an environmental impact report to the general contractor, which it attempted to do by hiring the engineering firm. As a result, the general contractor was a third party beneficiary under the water district's contract with the engineering firm. (*Id.* at p. 922.) The water district owed the general contractor "a legal duty not to hinder, delay, interfere with or prevent his performance." (*Id.* at p. 920.)

Aztec argues that *COAC, Inc.* stands for the proposition that third party beneficiary status arises if " 'performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary.' " The very language and facts of *COAC, Inc.* belie Aztec's position. Unlike in *COAC, Inc.*, the City did not owe Aztec a duty to pay for additional work done outside the scope of the Agreement. As discussed above, the Agreement clearly requires any modifications to be in writing. Aztec admits there was no written modification. That some City employees, including

the City's Director of Public Works, intended to compensate Aztec after the fact, through a subcontract with Parsons, does not create a liability. Government Code section 40602 requires all written contracts to be signed by the mayor based on approval by the city council. "It is undoubtedly the rule that a municipal corporation is not liable for the deeds or omissions of its servants done *ultra vires*. And this is true whether they acted with or without the express command of the municipality." (*Foxen v. City of Santa Barbara* (1913) 166 Cal.77, 81; *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1235.) To hold otherwise would be to allow Aztec to recover for work to which it was not entitled under the Agreement.

IV. Fourth Cause of Action: Breach of the Covenant of Good Faith and Fair Dealing

The law implies "in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." (*Harm v. Frasher* (1960) 181 Cal.App.2d 405, 417.) Thus, a breach of the covenant of good faith and fair dealing gives rise to an action for damages. (*Id.* at p. 415.) Aztec contends that "Respondent's conduct in promising but then refusing to execute the Modification Agreement after Appellant had relied to its detriment on Respondent's promise by providing the requested services, accepting Appellant's services without payment and then promising but refusing to use the Parson's Contract as an alternative vehicle through which to pay Appellant is not objectively reasonable, fair or in good faith." A breach of the covenant of good faith and fair dealing claim presupposes an underlying contractual obligation on which a plaintiff may base its claim. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684, 689-690.) There is none here.

Instructive is *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, where the court held that the implied covenant of good faith and fair dealing was limited to assuring compliance with the express terms of the existing contract and did not apply to negotiations for contract modifications. There, the parties were unsuccessful in negotiating modifications to a long-term concession contract. (*Id.* at p. 1028.) When the negotiations broke down, respondent brought suit against appellant

for breach of the implied covenant of good faith and fair dealing. The plaintiff alleged that the defendant had an obligation to negotiate in good faith since the existing contract contained a clause that contemplated future negotiations for contract modification. A jury rendered a verdict in favor of respondent and awarded damages. (*Id.* at pp. 1029-1030.) The appellate court reversed the judgment and held, "[t]here is no obligation to deal fairly or in good faith absent an existing contract. [Citations.] If there exists a contractual relationship between the parties, as was the case here, the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract. [Citation.]" (*Id.* at p. 1032.)

Similarly here, we hold there is no obligation to deal fairly or in good faith absent an existing contract modification. Aztec claims that its breach of good faith and fair dealing claim is based on the original contract and the City's contract with Parsons. This is not a situation where a plaintiff is entitled to recover under a derivative contract theory when it is not entitled to an action on the underlying contract. As described above, Aztec cannot assert a breach of contract action based on the Agreement given the language requiring any modifications to be in writing. Further, Aztec has no claim on the City's contract with Parsons, even if based on a third party beneficiary theory of liability. As Aztec has provided no authority contrary to *Racine & Laramie, Ltd.*, it cannot assert a claim for breach of the implied covenant of good faith and fair dealing.

V. Amendment to Allege Unjust Enrichment or Restitution

Finally, Aztec seeks to amend its complaint, arguing that its second amended complaint "clearly establishes the elements of a claim for unjust enrichment." As explained by the Supreme Court: " 'Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that contracts wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in *quasi* contract can be had for work performed under them. It is also

settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable.' [Citations.] And even though the person with whom the contract was made has supplied labor and materials in the performance of the contract and the public agency has received the benefits thereof, he has no right of action to recover in quantum meruit the reasonable value thereof." (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 88.) There is no reason to deviate from the rule stated above. Further, Aztec admits that it would not plead any facts different from its second amended complaint to include a claim for unjust enrichment or restitution. We see no reason to allow Aztec a fourth bite at the apple.

DISPOSITION

The judgment is affirmed. The City of South Pasadena to recover its costs of appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.